

Introduction: Before it can enter into a procurement contract, state government must comply with the requirements established by the South Carolina Consolidated Procurement Code. When an actual or potential bidder believes that the state has failed to follow those requirements, the bidder may submit a protest. (Section 11-35-4210 of the South Carolina Code of Laws) If a protest is properly submitted, the appropriate Chief Procurement Officer ("CPO") will administratively review that protest. This pamphlet is intended to give the public a general outline of how the CPOs typically handle the administrative review of a protest.¹

Since being established in 1981, the CPOs have operated informally. No formal practices or procedures have been adopted. *By publishing this pamphlet, the CPOs do not intend to prescribe or define the process. Rather, this pamphlet is published solely to assist those unfamiliar with the process. Please be aware that the information offered here is general. Practices among the CPOs may differ. Moreover, this pamphlet should not be considered as an interpretation or restatement of the law. To the extent this pamphlet is inconsistent with any code or precedent, it should be disregarded.*

The Law: Special rules govern the state's procurement process. In conducting their administrative reviews, the CPOs are guided by these laws and

apply them carefully. Vendors appearing before the CPO's should be acquainted with the applicable laws. Special attention should be given to the South Carolina Consolidated Procurement Code (S.C. Code Ann. §§ 11-35-10 to -5270), the Procurement Regulations (23 S.C. Code Ann. Regs. 19-445.2000), the opinions of the South Carolina Procurement Review Panel, and the opinions of our state courts. The Code, the Regulations, and the decisions of the Panel are available on the World Wide Web. Address on front cover.

Who Can Participate: If a hearing is held, the CPOs will usually allow the following players to participate: protestants, apparent successful vendors, the state agencies involved, and the responsible procurement office. Procurements regarding construction may also include a representative of the State Engineer's Office.

Lawyers: Many participants choose to retain legal counsel; however, it is not required. See Regulation 19-446. *The CPOs seek to ensure that everyone gets a fair opportunity to present their protest, whether or not they have a lawyer.*

Starting the Process: The Procurement Code provides a limited amount of time to file a protest. A protest must be received within that time by the appropriate CPO. While no particular form is required, protests are typically in the form of a letter. The content is more important than the form; your protest letter must "set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided." Section 11-35-

4210(2). The CPOs typically will not consider an issue not raised by the protest letter. ***The CPOs find it helpful if a protest letter identifies the exact statutory or regulatory requirement you claim the state failed to follow and exactly what relief you want.*** The more specific you are, the better.

Burden of Proof: The person filing a protest ("the protestant") bears the burden of proving their case by a preponderance of the evidence. Be prepared to explain your protest and to provide evidence proving your case.

How are Protests Decided. The Procurement Code requires that the appropriate CPO administratively review your protest. If appropriate, the CPO may hold a hearing to assist him in that process. If a hearing is held, the protestant will be notified in advance and in writing.

The Hearing: At hearings, all parties are given a chance to speak and introduce exhibits. The hearings are held in a large conference room with all the parties sitting around the table. By custom, the CPO sits at the end of the table. The CPO's lawyer sits to the CPO's right. The responsible procurement office sits at the CPO's left. Beyond that, parties sit wherever they can find room. Anyone actually testifying will ordinarily sit at the table while testifying.

At these hearings, no formal rules of procedure apply.² In a typical

hearing, the following course may be followed. After a brief welcome, the CPO asks everyone to introduce themselves and to sign an attendance sheet. The responsible procurement office then introduces key documents from the procurement file, including the solicitation, any relevant responses, and a chronology of significant events. After marking these exhibits, the CPO hears motions. *Motions:* Motions are a request from a party for the CPO to dispose of a protest, or some part of it, before hearing all the evidence. As the CPOs have not adopted any formal rules, no particular types of motions are necessary. In the past, the CPOs have entertained Motions to Dismiss for lack of jurisdiction (*i.e.*, protest not timely) and Motions to Dismiss for failure to state an issue of protest upon which relief can be granted.

If the protest is not resolved by a motion, parties are often given an opportunity to make a brief opening statement that explains their position. The CPOs do not always ask for opening statements, and parties need not make one. If allowed, parties are sometimes asked to speak in the following order: the protestant, the apparent successful vendor, the responsible procurement office, the acquiring state agency. Of course, the order varies depending upon which parties are involved. Once established, the same order is usually followed for the duration.

After opening statements, if any, the protestant is asked to present its case. A protestant is required to present evidence to prove its case. Simply

Accordingly, the CPOs will entertain such argument at their discretion.

¹ The Chief Procurement Officers are authorized to resolve contract controversies by S.C. Code Ann. § 11-35-4230. This brochure does not address that process. For information on that process, please see our website. Address on front cover.

² While no formal rules of procedure are followed, some lawyers argue, or make motions based upon, appropriate portions of the South Carolina Rules of Civil Procedure. While such argument is welcome, the process is an "administrative review," not a trial.

stating your position will not suffice. After the protestant has presented its case, the remaining parties will be allowed to respond. Depending on the complexity of the case and how many parties are involved, protestants may be asked to present their entire case either all at once or one protest issue at a time.

The CPOs should be addressed by their last name, e.g., Mr. Jones. Titles such as your honor and judge are unnecessary.

Evidence: As stated above, no formal rules apply at a CPO hearing. While the South Carolina Rules of Evidence do not apply,³ a party may object to the introduction of evidence if they feel the evidence is not relevant, trustworthy, or otherwise appropriate.⁴ Evidence usually comes from documents or witnesses.

Witnesses: A party representing themselves may testify on their own behalf. Otherwise, witnesses usually testify in response to questions. Parties and their witnesses should generally address themselves to the CPO, not to each other. After a witness has testified, each party is given an opportunity to ask that witness questions (cross examination). After all parties have questioned a witness, the CPO and the CPO's lawyer may also question a witnesses. Additional questions are

generally not allowed after the CPO has questioned a witness.

Documents: Documents may be offered as evidence, but other parties may object to their use. If you plan to offer documents to the CPO for review, please bring enough complete copies for everyone. Typically you will need six copies, one each for the protestant, the apparent successful offeror, the state agency involved, the responsible procurement office, the CPO, and the CPO's lawyer. You need not bring copies of the solicitation (IFB or RFP) or any of the bids or proposals. These documents will be available at the hearing.⁵

Record of the Hearing: The hearings are recorded solely for the CPO's convenience. The recordings are not transcribed. Witnesses may or may not be sworn, depending upon the CPO's individual preference.

If a CPO's decision is appealed to the Procurement Review Panel, all documents marked as exhibits during the CPO's hearing, as well as the protest letter, will be forwarded to the Procurement Review Panel.

Appeal: Any decision by a Chief Procurement Officer may be appealed to the South Carolina Procurement Review Panel, in accordance with S.C. Code Ann. § 11-35-4410.

³ The South Carolina Rules of Evidence are only mandatory for contested cases. S.C. Code Ann. § 1-23-330(1) (1986). As protest hearings are not "contested cases" as defined by the Administrative Procedures Act, the rules do not apply.

⁴ While not required to do so, lawyers are encouraged to state their objections with reference to the South Carolina Rules of Evidence.

⁵ When more than one party is represented by a lawyer, the lawyers are asked to exchange and, when possible, agree on the admissibility of, all exhibits prior to the hearing. **Exhibits should not be marked prior to the hearing.**

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PROTESTS BEFORE THE CHIEF PROCUREMENT OFFICERS

<http://www.state.sc.us/mmo/legal/lawmenu.htm>

This brochure is issued for informational purposes only. Nothing contained herein shall be construed to bind the Chief Procurement Officers as to any practice described herein.

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